

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2253 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
  2. To be referred to the Reporter or not? No
  3. Whether Their Lordships wish to see the fair copy of the judgement? No
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
  5. Whether it is to be circulated to the Civil Judge? No

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HEIRS OF KIKUBHAI DAYALJI DESAI

Versus

HANSABEN ZINABHAI DESAI HEIR OF MANIBEN @ DURGABEN B DESAI  
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Appearance:

MRS. SONAL D VYAS for Petitioners  
MR SUNIL C PATEL for Respondent No. 1  
SERVED BY DS for Respondent No. 2  
  
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CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 04/04/96

CAV JUDGEMENT

1. The petitioners who were original opponents No. 2/1 & 2/3 have filed this petition challenging the legality and validity of the order passed by Civil Judge (SD), Navsari, dated 10th November, 1995 below Exhibit 194 and 198. It appears that Hansaben Desai, respondent No.1 herein instituted Spl. Civil Suit No. 75 of 1979

in the Court of Civil Judge (SD), Navsari against the present petitioners as well as present respondents No. 2/1 & 2/2 who are the heirs and legal representatives of deceased Bhikhubhai Dayalji Desai. The suit was filed by Hansaben Zinabhai Desai for effecting partition of the houses No. 76 102 and 110 situated at Moti Khadki, village Vesma, District Surat. The suit was filed initially by Maniben alias Durgaben, who died during the pendency of the suit and present respondent No.1 Hansaben was impleaded as legal heir of the original plaintiff. It was her case before the trial court that the properties situated at village Vesma were the joint family property of one Bhikhubhai Dayalji. It was her further case that Maniben @ Durgaben, widow of Bhikhubhai Desai had 1/3 share in the suit properties and that the said properties situated at Moti Khadki, village Vesma, were not partitioned amongst the co-parceners. Therefore, the widow of deceased Bhikhubhai Dayalji Desai filed the aforesaid suit for partition. It appears that the said suit was resisted by his heirs respondents No. 2/1 and 2/2 as well as by the present petitioners who are the heirs of Kikubhai Dayalji Desai. It was their case that the aforesaid houses No. 76 102 and 110 were already partitioned and that deceased Bhikubhai Dayalji Desai had also filed earlier Civil Suit No. 135 of 1964 for partitioning the joint family properties consisting of the lands situated at village Alak, village Kala kachha, village Vesma, village Sadodara and village Sandalpur. Such suit for partition of agricultural land filed by deceased Bhikhubhai Dayalji Desai against his brother Kikubhai Dayalji Desai was decreed and the properties including the said houses were partitioned by metes bounds amongst the two brothers and the house No. 76 102 and 110 came to the share of Kikubhai Dayalji Desai. In such suit, a final decree was also passed and a right of maintenance of wife of Bhikubhai Dayalji Desai, namely, deceased Bai Durgaben @ Maniben was accepted and it was decreed that she was having a right of maintenance over the 1/3 of the estates of her husband Bhikhubhai Dayalji Desai.

2. It appears that in the subsequent suit which was filed by respondent No.1 being Spl. Civil Suit No.. 75 of 1979, a preliminary decree was passed on 20th March, 1982 in favour of Durgaben. Thereafter, valuation of the said property was got done at Exhibit 72 for 1/3 share of the suit property. In the meanwhile, said Durgaben expired and her daughter Hansaben - present Respondent No.1 was impleaded as heir and legal representative of Durgaben. She gave an application at Exhibit 165 in the suit for putting the properties to public auction. Such

application at Exhibit 165 was resisted by the heirs of Kikubhai Dayalji Desai, present petitioners inter alia contending that the report prepared by the valuer for 1/3 of the suit house was not proper and acceptable and that plaintiff has interest only in the properties situated in the Bazaar Street, village Vesma, bearing House No. 55 (new House No.72) which came to the share of deceased Bhikhubhai Dayalji Desai and that present respondent No.2 had no right, title or interest in the aforesaid property. After hearing the parties, the learned trial judge passed order below Exhibit 165 permitting the original plaintiff to participate in the public auction and to take set off of her 1/3 share of the above property. Application at Exhibit 194 was given by the plaintiff for further step to hold public auction of the properties and also for appointment of commissioner.

3. It is at this stage that the present petitioner filed an application at Exhibit 198 disputing or resisting the application at Exhibit 194 for proceeding further with the auction proceeding inter alia on the ground that the preliminary decree which was passed in Spl. Civil Suit No. 75 of 1979 was illegal, null and void and was not binding on them and that it was obtained by suppressing material and vital facts of final decree having been passed in the earlier suit being Civil Suit No. 135 of 1964. They also contended that the decree was passed in Civil Suit No. 135 of 1964 by consent of the parties i.e. two brothers Bhikhubhai & Kikubhai. They also contended that in fact there was a dispute between Durgaben @ Maniben, widow of Bhikhubhai Dayalji Desai and one Induben as regards house bearing No. 55 at Bazaar Street, village Vesama and that the suit filed by the respondent No.1 plaintiff claiming 1/3 share in the houses at Moti Khadi, village Vesma was a misconceived suit and that in fact they were not necessary parties to the suit.

4. Since the present petitioners were already parties to Spl. Civil Suit No. 75 of 1979 and since after regular trial, preliminary decree was passed accepting 1/3 share of the respondent No.1 plaintiff in the three houses at village Vesma, the trial court by judgment and order dated 10th of November, 1995 dismissed the application filed by the present petitioners at Exhibit 198 and granted the application filed by the original plaintiff at Exhibit 194 directing the properties to be put to public auction. It is such combined order below Exhibits 194 and 198 which is under challenge before this Court.

5. Mrs. Sonal D. Vyas, learned Counsel appearing for the petitioners (original judgment debtors) had strenuously urged before the court that though the preliminary decree of partition is passed against the petitioners and in favour of respondent No.1 recognising right of 1/3 share of respondent No.1 in the suit properties, the said properties cannot be put to auction as the decree in the subsequent suit is obtained by suppressing material and vital facts of earlier suit of partition having been filed between two brothers and properties having been already partitioned. It was contended by her that in the earlier suit of 1964 Bhikhubhai Dayalji Desai and Kikubhai Dayalji Desai were parties and preliminary decree was passed on 27th March, 1965 whereby old house No. 55 (new house no. 72) situated at Bazaar street, village Vesma went to the share of Bhikhubhai Dayalji Desai while rest of the properties went to the share of Kikubhai Dayalji Desai. It was also stated that since the property which has gone to the share of Bhikhubhai Dayalji Desai at Bazaar street was already purchased in court auction by Parasmal Ganpatlal Shah, actually no property was required to be partitioned and was required to be given to Bhikhubhai Dayalji Desai. The final decree passed in Regular Civil Suit No. 135 of 1964 was also produced before the Court.

6. In order to make good the aforesaid submission, she has relied upon the decision of the Apex Court in the case of S.P. CHENGALVARAYA NAIDU v. JAGANNATH (DEAD) reported in 1993 (6) JT 331. In the case before the Apex Court it was found that the preliminary decree was obtained by playing fraud on the court. The court took the view that when litigant withholds vital documents in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. The court also took the view that a person, whose case is based on falsehood can be summarily thrown out at any stage of the litigation. After referring to the quotation of Chief Justice Edward Coke of England, the Supreme Court observed that it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and nonest in the eyes of law. In the case before the Supreme Court, the application was made by the predecessor-in-interest of the respondents plaintiffs for final decree for partition; and separate possession of the properties. The appellants defendants before the Supreme Court however pointed out that the preliminary decree which was sought to be made final, was obtained by fraud and therefore the application for drawing the final decree was liable to be dismissed. The trial court

found that the preliminary decree was obtained by fraud and therefore no final decree could be drawn. The High Court however quashed and set aside the judgment and order of the trial court and the matter thus reached the Supreme Court. After appreciating the facts situation which were placed before the Supreme Court, the court found that in fact the preliminary decree was obtained by perpetrating fraud on the court.

7. Aforesaid decision of the Supreme Court, cannot have any application to the facts situation obtaining before this Court. Firstly, it shall have to be kept in mind that in the second suit which is filed by widow of Bhikhubhai Dayalji Desai, now represented by her daughter respondent No.1, what was claimed was 1/3 share in the properties. The Spl. Civil Suit No. 75 of 1979 is filed by widow of deceased Bhikhubhai Dayalji Desai who undoubtedly was not party to the earlier suit being Regular Civil Suit No. 135 of 1964. The earlier suit was clearly a suit for partition wherein preliminary decree was passed and after appointment of Court Commissioner, a final decree was passed by virtue of consent of the parties. It may be noted that in the subsequent suit which is filed by the widow of deceased Bhikhubhai Dayalji Desai in the year 1979, the present petitioners who are the heirs of deceased Bhikhubhai Dayalji Desai were already impleaded party defendants, the summons of the subsequent suit were admittedly served on them. The suit was thereafter disposed of on 20th March, 1982. The present petitioners did not produce any such proceeding of Spl. Civil Suit No. 75 of 1979 or any evidence or certified copy of the preliminary decree or final decree of the earlier suit. They, in fact, did not contest the suit at all. With the result that 1/3 share of the widow of deceased Bhikhubhai Dayalji Desai was accepted by the trial court. In fact, when the present petitioners were already made parties as defendants, they could have by contesting the suit disclosed full facts within their knowledge about earlier suit. The widow of deceased Bhikhubhai being not a party to the earlier suit obviously cannot know anything of the outcome of that suit. She is therefore not guilty of suppression of any vital or material facts. It was in fact for the defendants to point out the facts which were within their knowledge.

8. In the subsequently instituted suit and when summons was served on them and they did not appear before the Court and did not produce any evidence before the Court to show to the court that the matter was either covered by preliminary decree or by final decree, it is

not open to them now in the second suit when the preliminary decree is already passed to take up the contention that such decree was passed by fraud or by suppression of material fact. The fact which was within their knowledge and it was in their favour, could have been pointed out by them to the trial court and they could have resisted the claim of widow of deceased Bhikhubhai Dayalji Desai. In fact, widow of deceased Bhikhubhai Dayalji Desai had no knowledge of preliminary decree or final decree having been passed in Regular Civil Suit No. 135 of 1969. They were not aware of any such proceeding, which were the proceedings between two brothers. None of whom was alive at the time when the second suit was filed by the widow of one of the deceased brother. It is also pertinent to note that the subsequent suit was pending in the court for a period of over three years and in such suit at no point of time the present petitioners have taken up the contention that the decree passed in the earlier suit was suppressed and thereby fraud was committed with the court. The present petitioners by remaining absent and not producing any evidence whatsoever, permitted the trial court to pass a preliminary decree and pursuant to such preliminary decree, properties are sought to be partitioned by Court Commissioner by putting the properties to public auction, they have come forward and have alleged for the first time that the preliminary decree was obtained by fraud or by suppression of material fact. It is also required to be mentioned that the second suit is not filed by Bhikhubhai Dayalji Desai but it is filed by his widow claiming the share in lieu of right of maintenance over the properties in question. In such suit, she has joined the heirs and legal representatives of deceased Bhikubhai Dayalji Desai and therefore they had every opportunity to produce the certified copy of the preliminary decree or final decree passed in the earlier proceeding. It cannot be said that the decree obtained by the widow of deceased Bhikubhai Dayalji Desai was thus obtained by fraud or misrepresentation. In fact, the subsequent suit filed by the widow of deceased Bhikubhai Dayalji Desai was not contested at all by defendant No.2. The present petitioners are the heirs and legal representatives of defendant No.2 and they have admittedly not contested the second suit filed by widow of deceased Bhikubhai Dayalji Desai. Now at the stage when the preliminary decree is sought to be executed by appointment of Court Commissioner, the present petitioners have for the first time taken up contention which they could very well taken up in the trial before the Court which has passed the preliminary decree. The ratio of the aforesaid decision of the Supreme Court therefore would not apply to the

fact situation obtaining before this Court.

9. Mrs. Sonal D. Vyas has also placed reliance upon the decision of the Supreme Court in the case of SHRI RAJESHWARI PRASAD SINGH v. SHASHI BHUSHAN PRASAD SINGH reported in 1995 AIR SCW 3897. In the said case before the Supreme Court, in suit for partition filed by widow, a compromise decree was passed, where she was provided life estate for residence and in lieu thereof a portion of residential house was kept apart. In subsequent suit in preliminary ex part decree, aforesaid rights of widow not secured and such preliminary decree became final. In the proceeding arising from final decree, widow expressly stated that she would be satisfied to maintain her life estate in separate and demarcated portion of house in which she was living. On preliminary decree in subsequent suit becoming final, no property or interest in coparcenary was left behind the widow. Her daughter on the death of the widow wanted to be impleaded as legal heir and the court took the view that she cannot seek to come on record as legal representative of widow because the widow herself has agreed to have life estate only and that on her death, the life estate would come to an end. This court fails to understand as to how this decision could have application to the fact situation of the present case. In the case before this Court, the widow of deceased Bhikubhai Dayalji Desai has claimed 1/3 share in the properties at Moti Khadki, village Vesma and on her death, the daughter has claimed to continue her claim for the very share. A preliminary decree is passed in favour of the widow and such decree is sought to be executed. It is in such execution proceeding that the heirs of deceased Kikubhai Dayalji Desai have come forward and filed objections, which, in my opinion, are rightly for cogent reasons rejected by the trial court. In view of the aforesaid, I do not find any substance in this submission made by the learned Counsel appearing for the petitioners.

10. Aforesaid were the only submission which were made before this Court and since I do not find any substance in any of the submissions made, the Civil Revision Application fails and the same is dismissed. There shall be no order as to costs. Ad interim relief, if any, granted earlier shall stand vacated.

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